**IN THE COURT OF COMMON PLEAS**
**CUYAHOGA COUNTY, OHIO**

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| Bridget Perrin, et al. | ) | Case No. CV-05-580079 |
| | ) | |
| Plaintiff, | ) | |
| | ) | Judge: Mary J. Boyle |
| vs. | ) | |
| | ) | |
| Center for Women's Health, Inc., et al. | ) | **ORDER AND DECISION** |
| | ) | |
| Defendants. | ) | |

This matter is before the Court upon Defendants Center for Women's Health and Martin D. Ruddock, M.D.'s March 07, 2006 Motion to Bifurcate Pursuant to O.R.C. §§ 2315.21(B)(1)(a) and (b), as effective April 7, 2005, opposed by Plaintiffs Bridget D. Perrin and George Jenkins, Jr. in their March 27, 2006, Brief in Opposition, supported by Defendants in their May 1, 2006 Reply Brief, and opposed by Plaintiffs in their May 15, 2006 Sur-reply. For the following reasons, the Court hereby **DENIES** Defendants' March 07, 2006 Motion to Bifurcate.

## FACTS

This matter involves a medical malpractice claim brought by Plaintiffs in relation to medical care Plaintiff Bridget D. Perrin sought from Defendants on or about December 22, 2004, for the purpose of terminating a pregnancy. Plaintiffs claim Defendants breached the standard of care in performing the pregnancy termination procedure, and this breach proximately caused Plaintiff's alleged injuries. Plaintiffs are seeking both compensatory damages and punitive damages.

## LAW AND ARGUMENT

In their Motion to Bifurcate, Defendants argue that this Court is required to bifurcate the issues related to compensatory damages from the issues related to punitive

damages pursuant to R.C. § 2315.21(B)(1), which requires a court to bifurcate upon motion[1]. The effective date of this statute is April 7, 2005. Defendants contend that the date the Complaint was filed is the determinative date in considering whether R.C. § 2315.21(B)(1) is controlling. Plaintiffs argue that the determinative date is the date the cause of action accrued.

The Ohio courts have not specifically addressed this question. However, in determining whether a statute should be applied retroactively, the Ohio Supreme Court has held that, "where there is no clear indication of retroactive application, then [a] statute may only apply to cases which *arise* subsequent to its enactment." *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 105 (Emphasis added.). See also *Wean Inc. v. Industrial Commissioner* (1990), 52 Ohio St.3d 266, 268. Black's Law Dictionary describes the term "arise" in the following way: "A cause of action or suit 'arises', so as to start running of limitation, when party has a right to apply to proper tribunal for relief..., and it arises at time when and place where act is unlawfully omitted or committed...." Black's Law Dictionary (6th Ed. 1990). Furthermore, the Dictionary

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[1] R.C. 2315.21(B)(1) provides as follows:

(B) (1) In a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated as follows:

(a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(b) If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the second stage of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

describes the term "accrue," which is commonly used to refer to the point in time when an alleged wrongful act is omitted or committed, as meaning to "*arise*, to happen, to come into force or existence." *Id.* (Emphasis added.) Based on the fact that the Ohio Supreme Court chose to use the term "arise" in its decisions regarding when a statute can be applied retroactively, the most logical conclusion is that the determinative date in deciding whether a given statute applies is the point in time when the alleged wrongful omission or commission occurred. Here, the alleged medical malpractice occurred on or around December 22, 2004, and the Court hereby finds this to be the determinative date in deciding whether R.C. § 2315.21(B)(1) applies.

Since this cause of action arose before the enactment of R.C. § 2315.21(B)(1), the Court must now determine whether this statute should be applied retroactively. Defendants argue that R.C. § 2315.21(B)(1) applies retroactively because the bifurcation of a proceeding is purely remedial in nature, and thus constitutional under Ohio law. Plaintiffs argue that the statute should not be applied retroactively because the Ohio General Assembly did not expressly make the statute retroactive.

In *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, the Supreme Court articulated a two-step analysis that a court must follow in determining whether a statute violates the retroactivity provisions of the Ohio Constitution. Initially, a court must look at the intent of the General Assembly and determine whether the statute meets the threshold test for retroactive application contained in R.C. § 1.48, which states, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." The Supreme Court in *Van Fossen*, interpreting R.C. § 1.48, held where "there is no clear indication of retroactive application, then the statute may only apply to

cases which arise subsequent to its enactment." *Van Fossen*, 36 Ohio St.3d at 105, adopting *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262. See also *Wean Inc. v. Industrial Comm'n* (1990), 52 Ohio St.3d 266, 268; *Shaker Auto Lease v. City of Cleveland Heights* (June 19, 1997), 1997 Ohio App. LEXIS 2669, unreported (Eighth District). Only after a court has determined that the General Assembly intended a statute to be given retroactive application should that court consider whether the statute, as applied, violates Section 28, Article II of the Ohio Constitution. *Van Fossen*, at 105.[2]

Defendants rely on *Kilbreath v. Rudy* (1968), 16 Ohio St.2d 70, and a Lake County Common Pleas decision, *Altercare of Mentor Center for Rehab. and Nursing Care, Inc. v. Erwin* (Sept. 30, 2005), Case No. CV-05-000325, in support of their contention that a purely remedial statute can be applied retroactively regardless of whether the General Assembly expressly indicated as such. However, Defendants' reliance is misplaced. *Kilbreath* was decided well before *Van Fossen*. As described above, *Van Fossen* and its progeny have further defined this question of law. Thus, *Kilbreath* by itself is not representative of the law here. Further, the Lake County Common Pleas Court in *Erwin* appears to have simply interpreted the law incorrectly. Therefore, this Court shall rely upon the two-step analysis established in *Van Fossen* and its abundant progeny.

Pursuant to the *Van Fossen* two-step analysis, this Court finds that R.C. § 2315.21 (B)(1) does not apply retroactively because the General Assembly has not expressly declared that the statute shall be applied retroactively. Therefore, the version of R.C.

[2] The Ohio Supreme Court has held that only retroactive substantive laws violate the Ohio Constitution, (laws the create duties, rights, obligations, etc.) Purely remedial laws (rules of practice, rules of procedure, or methods of review) do not violate the Constitution if applied retroactively. *Kilbreath v. Rudy* (1968), 16 Ohio St.2d 70.

2315.21 (B)(1) as enacted on April 7, 2005 does not apply here because Plaintiffs' cause of action arose/accrued prior to the effective date of the statute, on or around December 22, 2004.

Since the Court has determined that the mandatory bifurcation provision under R.C. § 2315.21(B)(1) does not apply, the Court shall now consider Defendants' Motion pursuant to Civil Rule 42(B)[3]. Pursuant to Civil Rule 42(B), a trial court has total discretion to choose whether or not to have separate trials. *Burke v. Gene Hoffman Development Corp.* (April 14, 1977), 1977 Ohio App. LEXIS 8099, unreported (Eighth District), at *7-8.

In support of their Motion to Bifurcate, Defendants rely entirely upon R.C. § 2315.21(B)(1) and its mandatory requirement for bifurcation. As a result, Defendants have not made any showing of how they would be prejudiced if the compensatory and punitive claims are heard in one trial. Thus, without any showing of prejudice by Defendants, the Court hereby denies Defendants Motion to Bifurcate.

It is noted that the Court interprets Civil Rule 42(B) to only require a hearing if the Court decides to order a separate trial of a claim.[4] However, since the Court denies Defendants Motion to Bifurcate, a hearing is not necessary.

**CONCLUSION**

For the foregoing reasons, the Court hereby **DENIES** Defendants' March 7, 2006 Motion to Bifurcate. All dates and deadlines set at the February 22, 2006 case

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[3] Civil Rule 42(B) provides: **Separate trials.** The court, after a hearing, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right to trial by jury.

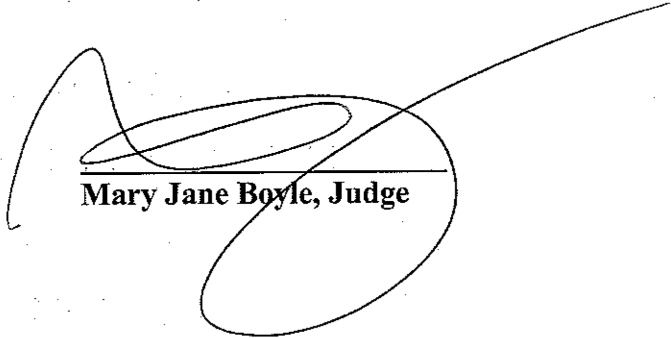
[4] Neither party requested a hearing.

management conference remain as previously set, *i.e.*, Defendants' expert report deadline is August 1, 2006, final pre-trial set for September 19, 2006 at 1:30 p.m., and trial by jury set for October 4, 2006 at 9:00 a.m.

**IT IS SO ORDERED.**

7-3-06

**Date**



**Mary Jane Boyle, Judge**

**CERTIFICATE OF SERVICE**

A copy of the foregoing Order and Decision was sent by regular United States Mail to the following attorneys this 3rd day of ~~June~~ July, 2006:

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**Mary Jane Boyle, Judge**